No. 18673

United States
COURT OF APPEALS
for the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
Appellant,

vs.

MILDRED LUNDSTROM,
Appellee.

Appeal from the United States District Court for the District of Oregon.

BRIEF OF APPELLANT

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JURISDICTION

As appears from the Pretrial Order (R. 1), this was an action commenced in the Oregon Circuit Court by Plaintiff, Mildred Lundstrom, a steamship passenger, against the defendant steamship owner, for personal injuries, and was removed to the United States District Court of Oregon for diversity of citizenship. From a judgment for plaintiff, defendant has appealed, R. 15.

Jurisdiction of the District Court rested on 28 U.S. C.A. Sections 1332 and 1441. Jurisdiction of this Appellate Court rests on 28 U.S.C.A. Sec. 1291.

STATEMENT OF THE CASE

The appellee, Mildred Lundstrom, afflicted with arthritis, and having broken her right hip sometime previously in a fall, was advised by her doctor, in The Dalles, Oregon, to take a trip to visit her son in the Air Force at the Tokyo Air Base in Japan. The object of the trip was to enable Mrs. Lundstrom to recuperate and relax and move around and "use the hip" and "depend on myself". Tr. 10, 20, 31, 59-60. She flew over to Japan, but planned to return by steamer, as giving her more opportunity to recuperate and relax. Tr. 20. She accordingly boarded the PRESIDENT HOOVER as a firstclass passenger at Yokohama on July 15, 1961, for the voyage home. Tr. 6, 83. Her son accompanied her to the ship and told the ship's purser, and also the chief steward, about his mother's arthritic condition, and that she had broken her hip and was unstable, and he was concerned for her safety, and "if anything happened to give her all the assistance he possible could". Tr. 9-12. He was assured that this would be done.

The ship sailed shortly after noon on the 15th of July. Tr. 83. On the 17th of July, in the afternoon, while ascending the stairway from A Deck to the Promenade Deck, to attend a Fire and Boat Drill, Mrs. Lundstrom fell at the top step (Tr. 47, 94) and broke her left hip. In the meantime, from the 15th to the 17th, two full

days, she had been moving about the ship freely and with no trouble at all, and had used the ship's stairways from A Deck, where her stateroom was, to B Deck below where the dining salon was, six different times, or rather twelve times counting each descent and ascent separately. These were: Going to dinner on the evening of the 15th; to breakfast on the 16th; to lunch on the 16th, to dinner on the 16th; to breakfast on the 17th; and to luncheon on the ~~18th~~ 17th. Tr. 84-6. These were the same kind of steps and handrailing as those from A Deck to the Promenade Deck where she fell. Tr. 85-6.

She also used the three or four steps to go to the raised balcony in the dining room where her table was. Tr. 35, 84. This, of course, was every time she went to her meals. And she did it without any difficulty at all. She also used the stairs to the library, but she says they were different. Tr. 86. The stairs to the Promenade Deck, where she fell, were by no means new to her. She had used them frequently before, as evidenced by this testimony:

> "Q. How did you know which stairway to use? (to go to the Boat Drill). Did anybody tell you?
> A. We *always* went up that way to the promenade deck. (Italics supplied).
> Q. You had been up there before?
> A. Yes." Tr. 46.

When the bell rang for the Boat Drill she went to the cupboard in her stateroom, and standing "on tiptoe" pulled out the lifejacket.—not an easy feat. Tr. 41-42.

She drove her own automobile. Tr. 64. 80.

She was not an inactive person.

Fire and Boat Drills are *mandatory*,—required by Coast Guard Regulations, having the force of law. They will be referred to more at length in the Argument. The Drill was held in strict accordance with them in every particular.

The life jacket which Mrs. Lundstrom was wearing was likewise of a type required and approved by the Coast Guard, and bearing the approval stamp thereon. There was nothing wrong with it. Nor was there anything wrong with the steps or handrailing.

The Drill occurred about three o'clock in the afternoon, apparently on a calm sea, since there is no evidence otherwise, or that the ship was rolling. Mrs. Lundstrom, ascending the stairs from A Deck to the Promenade Deck, completed the ascent successfully until she reached the top step, when she fell forward and broke her left hip. She ascribes her fall to the fact that she could not see, over the bulge of the lifejacket, the steps she was ascending. Tr. 48, 94-5, 99-100, 102 and 104. She never asked to be excused from the Drill; nor did she ever ask for any assistance. Tr. 96-7.

At the close of the case defendant moved for a directed verdict because there was no evidence of negligence, and especially because, since plaintiff herself stated that the cause of her fall was her inability to see over the lifejacket, and there was no evidence whatever that this was known or should have been known to the ship's officers, this necessary element of negligence was lacking. Tr. 113-114.

The motion was denied, and the verdict was returned for $30,515.82. R. 8. Judgment thereon was entered

with costs. R. 9-10. Defendant moved to set this aside, as not supported by the evidence and for judgment n.o.v. R. 11-13.

The Trial Judge, while expressing some doubt, overruled this, and in fact invited this appeal.

From his ruling this appeal is taken.

SPECIFICATIONS OF ERROR

Specification No. 1:

The Court erred in not directing a verdict and in not setting aside the judgment that was entered on the verdict rendered and entering judgment for defendant for the reason that there was no evidence tending to show negligence on the part of the defendant in permitting Mrs. Lundstrom to take part in a routine Fire and Boat Drill under the circumstances shown in this case.

Specification No. 2:

The Court erred in not directing a verdict and in not setting aside the judgment that was entered on the verdict rendered and entering judgment for defendant for the reason that Mrs. Lundstrom expressly testified that the cause of her fall was her inability to see, over the bulge of the lifejacket she was wearing, the steps she was ascending; and there is no evidence whatever that the ship's officers, or any other agent, knew or should have known of this fact. Consequently, an essential element necessary to hold the defendant liable for negligence causing the injury was lacking.

ARGUMENT

PLAINTIFF'S CASE IS BASED ON NEGLIGENCE, AND THERE WAS NO EVIDENCE OF IT. HENCE A VERDICT SHOULD HAVE BEEN DIRECTED; THE JUDGMENT ENTERED THEREON SHOULD HAVE BEEN SET ASIDE AND A JUDGMENT N.O.V. ENTERED.

First Point

There was no negligence in permitting Mrs. Lundstrom to take part in the fire and boat drill. Her activities about the ship for the two days previous refutes it. The drill was required by law. The stairway and lifejacket were in perfect condition.

The gist of plaintiff's case is that because of her arthritic condition and the ship's knowledge of it, conveyed by her son, she should not have been permitted to take part in the Fire and Boat Drill; or, if permitted, should have been assisted.

First it may be well to look at the Coast Guard Regulations. They are mandatory.

Sec. 78.17-50(a) says:

> "The master shall be responsible for conducting fire and boat drill at least once in every week. In the case of a vessel where the duration of the voyage exceeds 1 week, a fire and boat drill shall be held before the vessel leaves port and at least once a week thereafter." Def's Ex. 7.

Sec. 78.17-50(b) says:

> "The fire and boat drill shall be conducted as if an actual emergency existed. All hands should re-

port to their respective stations and be prepared to perform the duties specified in the station bill." Def's Ex. 7.

Sec. 78.17.50(b)(5) says:

"The passengers shall be encouraged to fully participate in these drills and shall be instructed in the use of the life preservers." Pltff's Ex. 7.

They were so instructed by a printed notice and picture illustrating a person donning a lifejacket posted in each stateroom. Def's. Ex. 6.

Sec. 78.47-47 says:

"Framed notices shall be conspicuously posted in the passenger staterooms indicating the following which may be posted separately or together.
78.47-47(a)(1) Emergency Signal:

EMERGENCY SIGNALS

FIRE AND EMERGENCY—CONTINUOUS RAPID RINGING OF THE SHIP'S BELL AND OF THE GENERAL ALARM BELLS FOR A PERIOD OF NOT LESS THAN 10 SECONDS.

ABANDON SHIP (OR BOAT STATIONS)—MORE THAN 6 SHORT BLASTS AND ONE LONG BLAST OF THE WHISTLE SUPPLEMENTED BY THE SAME SIGNAL ON THE GENERAL ALARM BELLS.

THE OCCUPANTS OF THIS ROOM ARE ASSIGNED TO LIFEBOAT NO. .....
ALL PASSENGERS ARE REQUIRED TO PUT ON LIFE PRESERVERS AND GO TO THEIR LIFEBOAT STATIONS WHENEVER GENERAL ALARM BELLS RING.

THE ROOM STEWARD WILL PROVIDE LIFE PRESERVERS FOR CHILDREN AT THE START OF THE VOYAGE.

> 78.47-47(a)(2) Life Preservers. The location of life preservers together with instructions and pictures showing how they are worn shall be indicated in a framed notice."
> Def's Ex. 7.

This notice is especially relevant for the reason that "Presslines", the little newspaper published on the ship and distributed to the various staterooms on the morning of July 17th, in announcing the Fire and Boat Drill for that afternoon, said that "All passengers are required" to attend these drills, etc. Plff's Ex. 3. Tr. 39, 40. And the inference was sought to be drawn at the trial, that Mrs. Lundstrom, by this, was obliged to attend the drill. But it will be observed that the language is identical with that in the Notice prescribed by the Coast Guard itself. In short, mandatory. But certainly did not preclude any passenger, having a reason, from being excluded.

Sec. 71.25-15(a)(3) says:

> "Each life preserver or wood float shall be examined to determine its serviceability. If found to be satisfactory, it will be stamped 'Passed', together with the date, the port, and the inspector's initials. If not in a serviceable condition, the life preserver or wood float shall be removed from the vessel. If the life preserver is beyond repair, it shall be destroyed in the presence of the inspector."

The life preserver used by Mrs. Lundstrom was approved by the Coast Guard in accordance with above. Def's Ex. 8, offered by plaintiff. Tr. 42.

The question then is:

Was there any evidence to support a finding that de-

fendant was negligent in permitting Mrs. Lundstrom to attend the Drill? Or to attend without assistance?

In considering this, these facts must be borne in mind:

1. The sea was smooth. The ship was steady. We may be sure of this, for had it been otherwise, it is certain plaintiff would have testified to it. Furthermore, boat drills are not ordinarily held in rough weather.
2. It was good daylight.
3. There was not a thing wrong with the ship anywhere. The stairway and handrailing were in good condition. There is no claim otherwise.
4. The lifejacket was approved and stamped by the Coast Guard. In fact very good. There is no claim to the contrary.
5. Mrs. Lundstrom was by no means an inactive or helpless person. She drove her own automobile. Tr. 64, 80. She undertook a voyage to Japan all alone. While living with her son she ascended and descended the stairs to the second story of his quarters every day for a month. Tr. 6, 16, 20-21.
6. Much is made of the son's warnings to the ship's officers about his mother's arthritis. But neither he nor his mother, nor her doctor, wanted her to be nursed and babied and held by the hand. The whole object of the trip was "to use the hip", (Tr. 10), and for "recuperation and to relax".

Tr. 20. And her doctor testified that she was able to walk around and take care of her personal needs, and go up and down stairs slowly,, (Tr. 60); and he advised the trip so she could "get some activity, keep these joints movable". Tr. 59. But the best evidence that she did not want undue and fussy attentions is her own statement that she took the trip so she "could get clear away from everybody and have to depend on myself". Tr. 31.

And this seems to have been the son's idea too. Although he was careful to explain to the purser and the steward his mother's condition, he never asked that she be assisted up or downstairs, or discouraged from taking part in the normal activities of the other passengers. His request was rather "*if anything happened* to give her all the assistance" needed. Tr. 9. (Italics supplied).

7. Pursuant to this declared object of this sea voyage, Mrs. Lundstrom partook freely of the ship's activities for two full days, from July 15th at noon, to July 17th, at three o'clock, using all the stairways, as already shown in our Statement. This was all without a hint or suggestion of any difficulty to any of the ship's officers,—as indeed there was none.

8. There was nothing unusual about the Fire and Boat Drill. It was normal in every way, and was fully explained to the passengers, including Mrs. Lundstrom, in the ship's newspaper, "Presslines". Plff's Ex. 3, and the Stateroom Notice, Def's Ex. 6.

9. Finally, Mrs. Lundstrom never asked to be excused from the Drill, or requested assistance, but with the other passengers went right along with it.

Now the question is: Was there anything in the foregoing circumstances which should have put the ship's officers on notice that Mrs. Lundstrom should not participate in the Fire and Boat Drill?

This is not a mere question of fact. It is a question of law.

The question may be put another way: Is a shipowner whose ship and equipment are in perfect condition, who holds a routine Fire and Boat Drill, as required by law, encouraging the passengers to participate, again as required by law, liable to a passenger who, although arthritic, has been taking part in the ship's activities for two whole days without any difficulty, and without any hint or suggestion that she could not participate in the Drill, or any request to be excused?

It is true the shipowner owes a high degree of care, but also true that he can assume every passenger will exercise reasonable care to look after his own safety, and also true that the shipowner is not an insurer. Gilmore and Black, Law of Admiralty. Page 22 note.

We suggest that to hold the shipowner liable under the circumstances here would be to make him an insurer. As the Court said in *Weill* v. *Cie Gen. Transatlantic,* 113 F.2d 720,—

> "It does not seem to us that a steamship company can reasonably be held to so strict a duty of care."

In this case a jury's verdict was set aside. As was also done in *Van Nieuwenhove* v. *Cunard,* 216 F.2d 31, which see.

Second Point

Mrs. Lundstrom testified expressly that the cause of her fall was her inability to see, over the bulge of her lifejacket, the steps she was ascending. This was a statement of fact—not opinion. There is not the slightest evidence that the ship's officers knew or should have known of this. Hence this necessary element of negligence was lacking.

Mrs. Lundstrom testified not once, but several times, and without any equivocation or qualification, that the cause of her fall was that she could not see, over the bulge of her lifejacket, the stairs she was ascending, and in consequence fell at the top step because she thought she was stepping out on the deck.

Since she had successfully ascended the whole flight of stairs to the top, it is difficult to believe that she could not see; but accepting her statement as true, there is no evidence whatever that this inability to see was known or should have been known to the ship's officers. (In fact her successful ascent of the whole flight would, if they knew of it, confirm them in their belief that she could see.)

The testimony was explicit. Here it is:

"Q. In other words, you thought you had reached the top step—I mean you thought you had reached the top deck?

A. That is right.

Q. But instead of that there was one more step

and you were not on the deck?

A. One step.

Q. And you fell because you were mistaken as to that step; is that it?

A. I went to step forward and I couldn't see, and I had this life jacket on and I couldn't see and I fell.

Q. And because you had the life jacket on and couldn't see you fell?

A. That is right.

Q. Is that right?

A. That is right." Tr. 94-95.

She repeated this several times. For example:

"Q. That is what I thought. Now, you attribute your fall to the fact that you couldn't see over this bulging life jacket and see what you were doing?

A. That is right.

Q. That is why you fell?

A. Yes." Tr. 99-100.

And again she said:

"A. I couldn't see, Mr. Wood." Tr. 102

And again:

"I didn't see the step." Tr. 104.

Earlier on her direct examination she had testified to the same thing:

"Q. Were you able to see right down immediately below your feet as you went up there?

A. No, I couldn't. I couldn't see my feet from the time I got that thing on." Tr. 48

Since she herself gave this as the sole cause of her fall, and the ship's officers did not, or could not, know of it, a verdict should have been directed. But the Trial Judge held her statements to be, not a statement of fact,

but an expression of opinion, citing *Fleischman Distilling Corp.* v. *Mayer Brewing Co.,* decided by this Court February 12, 1963, 314 F.2d 149, 158-159. It is impossible for us to agree. The person who falls knows better than anyone in the world *why* she fell, and when she stated it positively as a *fact,* it seems to us it must be accepted as a *fact.*

If the *Fleischman* case is in point at all, it helps us. Fleischman's vice-president was asked—"Is it your contention, Mr. Baumgarten, that a customer would be confused in buying" between Black & White Scotch Whiskey and Black & White Beer? He said "No". This, of course, was a mere statement of his "contention". The Court, however, treated it as a denial of the existence of any confusion. It then says "Of course this is something more than a mere expression of opinion". The Court then cites the cases to the effect that mere expressions of opinion are not binding. And then avoids the whole question on another ground.

But how, it may be asked, can the witness's statement that a customer would not be confused between the two brands be "something more" than an opinion, and Mrs. Lundstrom's flat statement that she (who would know better than anyone) fell because she could not see, be a mere expression of opinion?

We have the highest respect for Judge Kilkenny, but in this he was in error.

He fell into a further error when, to justify his ruling, he said that Mrs. Lundstrom's arthritic condition made her hands more or less like claws, and a jury could well

believe that her hands were to a greater or lesser extent useless to her. This can only mean that she could not hold onto the steps' handrail. But not only is there no such claim in plaintiff's contentions in the Pretrial Order, but all of plaintiff's testimony is directly to the contrary. She said repeatedly that she held onto the handrail, and "tightly". Tr. 49-50.

Speaking of the steps to the balcony in the dining-room, she said:

> "It had a railing, and it wasn't too difficult for me to get up. I could hold something." Tr. 35.

Again, referring to the stairs where she fell:

> "A. When we got to the stairway I had a hold of the railing." Tr. 46.

Again:

> "Q. Did you have hold of that right-hand hand-rail?
> A. Yes, I did." Tr. 48.

Again:

> "A. And I really do hold on tightly when I go up and down, because I need help.
> Q. Is that the way you were holding onto the railing when you got hurt?
> A. That is right." Tr. 49-50.

Again:

> "Q. There was a railing to hang onto on these ship steps, wasn't there?
> A. And I hung onto it.
> Q. What?
> A. I hung onto it." Tr. 82.

Again:

> "A. I hung onto the railing, though, and I

watched every step I took. I had to go one at a time." Tr. 85.

Again:

"A. . . . I was holding onto the railing and trying to get up the steps." Tr. 104.

In the light of this testimony, it is impossible to believe that she could not use her hands. All of her own testimony says she could, and *did*. And she nowhere claimed that she could not.

Therefore, when Judge Kilkenny suggested that this might have been inferred by the jury, as a cause of her fall, when her own testimony denies it, and she expressly said that the cause was her inability to see, he was again in error.

CONCLUSION

The plaintiff's case must fail:

First, because for the reasons urged in Point 1, there was nothing whatever in the evidence that would put the ship's officers on notice that she should not participate in the Drill, considering her previous activities on the ship and the manner in which the Drill was held.

Secondly, it must also fail because she is bound by her admission that the cause of her fall was her inability to see over the bulge of the jacket, and there was no evidence of any kind that the ship's officers knew or should have known of this.

The kind of care required of a steamship toward a

passenger has been variously stated as "high". "very high", "utmost", etc., but really has nowhere been better stated than by this Court in *The Korea Maru,* 254 F. 398, where, at Page 399, the Court said:

> "The care required of a carrier in transporting passengers, and its consequent liability, is sufficiently stated for the present purpose under the general rule that, although the carrier does not insure that the passenger will be carried safely, still it is bound to exercise as high a degree of care, skill, and diligence in receiving a passenger, conveying him to his destination, and setting him down safely, as the means of conveyance employed and the circumstances of the case will permit."

Aquino v. *Alaska SS Co.,* 91 P.2d 1014, also states the rule on Page 1017, quoting, among other authorities, the decision of this Court in *Kitsap County Transportation Co.* v. *Harvey,* 15 F.2d 166. In that case it was held that the ship, even in the exercise of the highest care, could not anticipate that a dog tied to the ship's deck-rail might bite a passenger, and therefore was not negligent.

Probably, however, the best statement of the rule, because of its high authority, is in the opinion of the Supreme Court of the United States, in *Atchison, T. & S.R. Co.* v. *Calhoun,* 213 U.S. 1; 53 L. Ed. 671. In that case a railroad had left a baggage truck at the end of its station platform. A train was at rest, with its passenger cars some little distance from the truck. It was dark. The train started up and a bystander snatched up the plaintiff, an infant passenger, and ran alongside the train in an attempt to hand the plaintiff into the arms of his mother standing on the steps of a car. In doing

so he stumbled over the baggage truck and lost hold of the child, who fell under the car and was injured.

The Court, in reversing a judgment for the plaintiff, said:

> "It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But, even where the highest degree of car is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that, 'if men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.' Pollock, Torts, 8th ed. 41."

The Court said:

> "We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence." 53 L. Ed P. 675.

We submit that these authorities and *Weill* v. *Cie Gen. Transatlantic,* 113 F.2d 720, and *Van Nieuwenhove* v. *Cunard,* 216 F.2d 31, already cited, amply support appellant's position, both on its First Point, that there was nothing in the evidence to put the ship's officers on notice that Mrs. Lundstrom should not participate in the drill, or that injury would result therefrom;

and on the Second Point, that there was no evidence of any kind that the ship's officers knew or should have anticipated that she could not see over the life-jacket and would thereby be injured.

A verdict should have been directed, and when it was not directed, the judgment should have been set aside and judgment n.o.v. entered for defendant.

Respectfully submitted,

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APPENDIX

Page References to Exhibits. Rule 18

Exhibits		Pages of Transcript
Plf's 3	"Presslines"	39
Def's 6	Stateroom Notice	98-99
Def's 7	Coast Guard Regulations	108-111; 116
	Note: One section of these, offered by Plf.	116
Def's 8	Life Jacket, offered by Plf.	42